

Office of Chief Counsel
Internal Revenue Service

memorandum

GL-128768-00

WPBoulet

date: **MAY 16 2001**

to: Taxpayer Advocate Service
Attn: Tom Sherwood, Local Taxpayer Advocate

from: Area Counsel
(Small Business/Self-Employed:Area 5)

subject: **Request for Counsel Opinion**
Re: I.R.C. §6304(a)(2)

This memorandum responds to your request for advice related to I.R.C. §6304(a)(2), enacted as part of the Internal Revenue Service Restructuring and Reform Act of 1998 ("RRA 98").

ISSUES

1. Whether restrictions on direct contact with represented taxpayers in collection matters, contained in I.R.C. §6304(a)(2), apply to the Taxpayer Advocate Service ("TAS").

2. If I.R.C. §6304(a)(2) applies to TAS, what legal remedies are available to taxpayers in cases where violations have taken place.

3. In the event I.R.C. §6304(a)(2) applies, should TAS notify taxpayers and/or their representatives of violations and remedies available to them.

CONCLUSIONS

1. When a taxpayer initiates contact with TAS, he or she has consented to direct contact by TAS and has, therefore, waived the protections that I.R.C. §6304(a)(2) would otherwise provide. In any event, based on our review of the statute and its legislative history, we conclude that §6304(a)(2) does not apply to TAS in the collection matters it handles. However, since there are litigating hazards associated with this position, we advise you to proceed with the collection matters your office handles by documenting, as described below, the taxpayers' consent to direct contact by the TAS.

2. If it were ever determined that I.R.C. §6304(a)(2) applies to TAS, taxpayers could attempt to collect damages against the United States under I.R.C. §7433 for reckless, intentional or negligent

disregard of the restriction on direct contact. Damages would be restricted to actual, direct economic damages resulting from the violation of I.R.C. §6304(a)(2), subject to the dollar limits imposed by section 7433.

3. If it were ever determined that I.R.C. §6304(a)(2) applies to TAS, the government would have no duty to inform the taxpayer of any violations or of the potential remedies available. Nevertheless, if you encounter such a situation and believe that a taxpayer has been harmed by TAS actions, we recommend that the issue be reviewed and a correct course of action determined on a case-by-case basis. We stand ready to assist you in the event such a situation arises.

FACTS

It has come to the attention of your office during a case review that your staff had made direct contact with a represented taxpayer. Upon discovering what you thought might be a potential violation of sec. 6304(a)(2), your office (1) advised the Treasury Inspector General for Tax Administration of a potential Section 1203(b)(6) violation, and requested TIGTA's feedback, (2) reviewed TAS's inventory dating back to June 1, 2000, and determined that direct contacts with represented taxpayers had occurred in approximately 15 to 22 percent of the local TAS cases during this selected time period, (3) commenced training your staff on the requirements of sec. 6304(a)(2) after TIGTA declined to open a case on the issue, since it determined the issue involved training rather than an act of retaliation or harassment against the taxpayer, and (4) sought advice from Counsel by written request.

DISCUSSION

I. Purpose and Function of the Office of the Taxpayer Advocate

In determining the applicability of section 6304(a) to the TAS, it is first necessary to understand the function of the TAS within the IRS. The IRS Restructuring and Reform Act of 1998 ("RRA 98") replaced the IRS problem resolution system with a system of local Taxpayer Advocates reporting directly to the National Taxpayer Advocate. The Office of the National Taxpayer Advocate is an independent function within the IRS, separate from the operating divisions and the examination, collection and appeals functions. See I.R.C. §7803(c). The purposes of the Taxpayer Advocate Service are to (1) assist taxpayers in resolving problems with the IRS, (2) identify problem areas which taxpayers experience in their dealings with the IRS, (3) propose changes in IRS administrative practices to mitigate these identified problems, and (4) identify potential legislative changes to mitigate such problems. I.R.C.

\$7803(c)(2)(A). The National Taxpayer Advocate is also required to make annual reports pertaining to activities of the Office of the Taxpayer Advocate and related matters specified in the statute. I.R.C. \$7803(c)(2)(B). These reports are to be made directly to Congress, without prior review or comment from the Commissioner, the Secretary of the Treasury, the IRS Oversight Board, any other officer or employee of the Department of the Treasury, or the Office of Management and Budget. Id.

Local taxpayer advocates report directly to the National Taxpayer Advocate or her delegate. I.R.C. \$7803(c)(4)(A)(i). This differs from the former employees of the Problem Resolution Office, who reported to the IRS District Director. The statute also provides that the local taxpayer advocate shall, in the initial meeting with any taxpayer seeking assistance, inform the taxpayer that the Taxpayer Advocate offices operate independently of any other IRS office and report directly to Congress through the National Taxpayer Advocate. I.R.C. \$7803(c)(4)(A)(iii). Additionally, pursuant to I.R.C. \$7803(c)(4)(A)(iv), at the discretion of the taxpayer advocate, TAS may not disclose to the IRS "contact with, or information provided by, such taxpayer." Furthermore, the statute requires the local taxpayer advocate offices to maintain independent communications from those of the IRS in the form of separate phone, facsimile, and other electronic communication, as well as a separate post office address. \$7803(c)(4)(B).

TAS becomes involved in a case when it is asked by the taxpayer to resolve problems with the IRS. Sometimes the taxpayer's request for assistance is prompted by IRS personnel who, in a particular case, recommend that the taxpayer seek help from TAS.

Enforced collection action is not a recognized function of the TAS. However, because the Commissioner has delegated to the TAS certain customer service type responsibilities, the TAS does have authority to take certain actions generally considered to be within the collection arena. For example, the TAS is delegated the authority to enter into installment agreements and to determine certain categories of cases to be currently not collectible. The TAS can also request that the IRS collections division file Federal Tax Liens as part of the resolution in a particular collection matter.

II. I.R.C. \$6304(a)(2)

Section 6304(a)(2) was added to the Internal Revenue Code (the "Code") by section 3466 of RRA 98. In general, \$6304 makes certain provisions of the Fair Debt Collection Practices Act ("FDCPA") applicable to the IRS, placing restrictions on collection practices which are considered to constitute abuse or harassment. In

particular, as relevant to your request for advice, sec. 6304(a) and (a)(2) provide that "without prior consent of the taxpayer ... the Secretary may not communicate with the taxpayer in connection with the collection of any unpaid tax ... if the Secretary knows such person is represented by any person authorized to practice before the [IRS] ... unless such person fails to respond within a reasonable period of time ... or unless such person consents to direct communication with the taxpayer."

The FDCPA contains comparable language, at 15 U.S.C. §1692c(a)(2), prohibiting a "debt collector" from directly communicating "with a consumer in connection with the collection of any debt" where the debt collector knows the consumer is represented by an attorney in the matter and can readily determine the attorney's name and address, unless the attorney fails to respond to a communication within a reasonable time or unless the attorney consents to direct communication with the consumer. Id. With exceptions, the FDCPA defines "debt collector" as "any person ... in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due ... another." 15 U.S.C. §1692a(6). The FDCPA excepts certain categories of persons and entities from the definition of "debt collector," including a nonprofit organization which, at the consumer's request, "performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts" to the creditor. 15 U.S.C. §1692a(6)(E). The FDCPA also specifically excepts from its application government officers and employees who are performing collection activities in the performance of their official duties.

The legislative history of RRA 98 indicates that Congress wanted to apply to the IRS certain restrictions on debt collection similar to those faced by private debt collectors. See S.Rep.No. 105-174. In particular, Congress wanted to make the restrictions relating to communications with the taxpayer/debtor, and the prohibitions on harassing or abusing the debtor (through off-hour phone calls and other intimidating tactics) applicable to the IRS by incorporating similar provisions into the Internal Revenue Code. Id. The legislative history states, however, that the restrictions relating to direct communication with represented taxpayers are not intended to "hinder the ability of the IRS to respond to taxpayer inquiries (such as answering telephone calls from taxpayers)." Id.

ANALYSTS

1. Direct contact by a taxpayer with TAS is a waiver of any protections which might otherwise apply under I.R.C. §6304(a)(2).

Section 6304(a) expressly provides that consent of the taxpayer is an exception to or a waiver of the remaining requirements of this statutory provision. A waiver of the protections afforded by sec. 6304(a) can be either express or implied from the circumstances. As noted above, the legislative history of the provision specifically contemplates the IRS responding directly to taxpayer-initiated inquiries without running afoul of sec. 6304(a). For example, when a taxpayer calls the IRS, Congress contemplated that an IRS response would not be covered by the statute. Likewise, where a taxpayer initiates contact by letter or by Form 911 (which provides a place where the "person to contact" can be named, best time to call, etc.), the taxpayer's consent to direct contact is fairly clear. Thus, contact by the taxpayer should reasonably be construed as a waiver of the requirements of section 6304(a) for purposes of the initial follow-up/response to that taxpayer.

It is not clear, however, that such consent, where a POA is on file, continues over time and as additional contacts are made with the taxpayer. Therefore, it is necessary that you clarify the specific intentions of the taxpayer and the scope of the waiver being provided and make note of it in the file. This can be done simply by asking whether the taxpayer would prefer to bring in the representative for any substantive discussions of their case or continue to deal directly with TAS personnel until the matter is resolved. This simple, up-front inquiry can be quickly accomplished, while giving rise to important benefits. For example, it shows TAS's commitment to respect the taxpayer's choice to be represented. We would also recommend that in any instance where there is a valid POA on file and the taxpayer is requesting direct contact, rather than contact through the POA, a simple acknowledgment of the taxpayer's request be drafted and mailed to the taxpayer with a copy to the POA, unless the taxpayer has expressed an objection to contact with the POA. This type of documentation protects the Service and TAS personnel from subsequent claims that the taxpayer was intentionally deprived of the protections afforded under §6304(a).¹

¹ The determinations and recommendations made herein relate to our legal analysis of the requirements of section 6304(a). They do not in any way supercede policies and procedures for taxpayer contact provided for in TAS procedures.

2. In any event, it is our opinion that the direct communication restrictions contained in I.R.C. §6304(a) do not apply to TAS communications with taxpayers.

We have found no authority which interprets the meaning of I.R.C. §6304(a)(2). Therefore, the scope of the new Code provision must be interpreted using the plain meaning of the words which appear in the statute and by reference to its legislative history.

It is our opinion that the restrictions contained in sec. 6304(a)(2) do not apply to the activities in which the Office of the Taxpayer Advocate participates. We have come to this conclusion primarily because the language of the provision itself makes the restrictions on direct communications with represented taxpayers applicable only to communications "in connection with collection" of unpaid taxes. As discussed above, the purpose and function of the Taxpayer Advocate Service is to "assist taxpayers in resolving problems with the Internal Revenue Service." I.R.C. 7803(c)(2)(A)(i). This function, considered together with the statutorily mandated independence of the Taxpayer Advocate from the rest of the IRS, leads us to conclude that TAS does not communicate with taxpayers about "collection" per se. Rather, communications by TAS are in connection with its role in providing taxpayers assistance in resolving problems with the IRS.

Our interpretation of sec. 6304(a) is somewhat nuanced, but it is entirely consistent with the purpose of the provision. As noted above, the legislative history of sec. 6304(a) expresses the Congressional intent to stop abuse and harassment of taxpayers by importing into the Internal Revenue Code restrictions similar to those imposed upon private bill collectors by the FDCPA. Accordingly, it is our opinion that sec. 6304(a) is aimed at the Collection Division, and not the Taxpayer Advocate, since the Taxpayer Advocate's role is to provide assistance and, in appropriate cases, relief from hardships caused by tax collection. Although the subject matter of the relief provided by TAS may involve collection of taxes, the function performed by TAS is not that of a collection agent. Rather, TAS performs a function more akin to a consumer credit counseling service, which is excepted from the reach of the FDCPA even when it receives payments from a consumer and transmits those payments to creditors in assisting the consumer to liquidate his debts.

Although we conclude that sec. 6304(a) does not apply to TAS, we nevertheless advise you that the prudent approach is for you to act in the manner discussed above, i.e., by noting in the file any waiver by the taxpayer of the provision. We support this conservative approach for two reasons: (1) because there is no case law or other authority on the issue, giving rise to litigating

hazards if challenged by an aggrieved taxpayer, and (2) because respecting a taxpayer's choice to be represented in his or her dealings with the IRS is good policy. Therefore, we support your efforts to train your staff concerning this issue, and we encourage you to continue on the course you have set.

3. A violation of the direct-communication restrictions under section 6304(a)(2) could potentially give rise to damages pursuant to section 7433.

Section 7433(a) of the Internal Revenue Code provides a civil cause of action against the United States if, "in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title." Except as provided in section 7432 (involving civil damages for failure to release a lien), the cause of action provided in sec. 7433 is the exclusive remedy for recovering damages resulting from such collection action.

The damages which can be recovered are limited by sec. 7433(b) to \$1,000,000 (\$100,000 in the case of negligence). The recoverable damages are further limited to "actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee, and ... the costs of the action." I.R.C. §7433(b)(1) and (2). A prerequisite to obtaining a damage award is that the plaintiff must have first exhausted any administrative remedies available within the IRS. I.R.C. §7433(d)(1). An action to enforce liability for damages from unauthorized collection activities must be brought within two years after the date that the right of action accrues. I.R.C. §7433(d)(3); Treas. Reg. §301.7433-1(g).

Based on the foregoing, if a court were ever to determine that TAS has violated sec. 6304(a)(2) in connection with collection of a Federal tax, section 7433 would provide "the exclusive remedy for recovering damages resulting from such" action. I.R.C. §7433(a). We note, however, that as a practical matter a plaintiff would have substantial difficulty proving actual, direct economic damages resulting from direct contact by TAS with a represented taxpayer.

4. In the event it is ever determined that sec. 6304(a)(2) applies to TAS, TAS is not required to inform the taxpayer or his representative of a potential violation of such provision.

We have found no authority which would require TAS to report potential violations of sec. 6304(a)(2) to a taxpayer or his representative. As pointed out above, we conclude that no such


violations have occurred. Moreover, even if a violation had taken place, it is unlikely that a technical transgression of this nature would result in any direct, economic damages payable to the taxpayer. Additionally, with respect to the direct contacts already made by your office with represented taxpayers, the situation you have described to us does not appear to have resulted from any reckless, intentional or negligent disregard of the Code or the regulations. In the unlikely event that you believe you have encountered a situation with potential damage having been done, we ask that you contact us so that a review of the facts can be performed and appropriate action taken. In other words, if actual damage were experienced by a taxpayer due to direct contact by a TAS employee with a represented taxpayer, we would not rule out as a policy matter notifying the taxpayer (or their representative) of the problem, or taking other necessary action to achieve a fair result.

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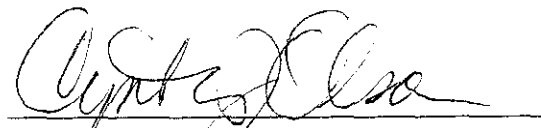
If you have any questions concerning the foregoing, please contact me at (303) 844-3258, ext. 268.

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